IN RE THOMPSON CREEK TIMBER SALE

IBLA 82-1325 Decided June 7, 1984

Appeals from the decision of the District Manager, Bureau of Land Management, Medford, Oregon, denying protests by the Threatened and Endangered Little Applegate Valley and the Applegate Citizens Opposed to Toxic Sprays against the Thompson Creek Timber Sale, Tract No. 81-11. OR 110-TS2-141.

Affirmed.

1. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales -- Timber Sales and Disposals

   In reviewing a denial by the BLM of a protest of a timber sale on lands managed pursuant to the Act of Aug. 28, 1937 (O & C Act), 43 U.S.C. § 1181a (1982), on the issue of violation of the principle of "sustained yield," the Board will defer to BLM's judgment in the absence of a clear showing of failure to consider critical factors or that the timber sale is not supported by the administrative record.

2. Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales -- Timber Sales and Disposals

   In determining regeneration for purposes of high intensity timber management land, the term "stocked" referring to the number of suitable trees per acre is properly distinguished from "established" referring to a stand of suitable growing trees which have survived at least one growing season.

3. National Environmental Policy Act of 1969: Environmental Statements

   An agency has a continuing duty to gather and evaluate data pertinent to the environmental impacts of a Federal action after release of an environmental impact statement (EIS) in connection with the action. A supplemental EIS may not be required where some deviation from the action outlined in the EIS is proposed, the change is supported on a rational basis of record, and the adverse impact would be reduced as a result of the change.

APPEARANCES: Joan Peterson and Diana Coogle for Applegate Citizens Opposed to Toxic Sprays; Genevieve Windsor for Threatened and Endangered Little Applegate Valley; Hugh Shera, District Manager, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Two citizen groups, one called "Threatened and Endangered Little Applegate Valley" (TELAV) and the other called "Applegate Citizens Opposed to Toxic Sprays" (ACOTS), have appealed the July 20, 1982, decisions of the District Manager, Medford, Oregon, Bureau of Land Management (BLM), denying their protests of the proposed Thompson Creek Timber Sale, Tract No. 81-11. BLM advertised the timber sale pursuant to the provisions of 43 CFR Subpart 5443 for 90-day sales, and received one bid. BLM has stayed its awarding of the contract to the bidder, Capital Veneers, Inc., pending the disposition of the appeals.

Under the terms of the proposed sale, timber is to be harvested from 325 acres located in various units in sec. 19, T. 39 S., R. 4 W., and sec. 25, T. 39 S., R. 5 W., Willamette meridian. The silvicultural prescriptions provide for clearcutting in patches on certain units and for regeneration cutting and/or overstory removal on the remaining units.

The statement of reasons for appeal filed by appellants raises two major issues. The first is whether the land embraced in the timber sale qualifies as "high intensity" forest land suitable for continuous timber production. Further, the brief of ACOTS challenges the apparent discrepancy between the "basal area" to be left in the regeneration cut tracts and the basal area to be left as indicated in the Jackson-Klamath Final Environmental Statement (FES). ACOTS has also challenged the "economics" of BLM timber practices and of this particular sale "in which the trees were sold for a loss." Appellant contends that the minimum stumpage value for which the timber was sold will fail to cover the cost of forest management. Further, ACOTS contends that BLM's price depresses the market for timber on private land.

Initially we must note the apparent lack of standing of appellants to challenge the sale on the ground of adequacy of the price. Particularly relevant here is the admonition recited in the case of In re Otter Slide Timber Sale, 75 IBLA 380, 386 (1983) (Stuebing, A. J. concurring):

> Status as a member of the general public, a citizen, and a taxpayer (none of which may be asserted by North Myrtle Watershed Study Council) has long been held to be insufficient to invoke appellate review where the issue presented relates merely to the general welfare and the indirect interest of the citizen taxpayer in the affairs of his government. Massachusetts v. Mellon, 262, U.S. 447 (1923). Abstract injury is not enough. It must be alleged that the appellant has sustained, or is immediately in danger of sustaining, some direct injury as the result of the official conduct. O'Shea v. Littleton, 414 U.S. 488, 494 (1973).

> [A taxpayer's] interest in the moneys of the Treasury - partly realized from taxation and partly from other sources - is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for appeal * * *.
>
> [I]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review, but also in respect of every other appropriation act and statue whose administration requires the outlay of public money, and whose validity may be questioned.

Massachusetts v. Mellon, supra, at 487.

A more modern application of the rule is found in Society Hill Civic Association v. Harris, 632 F.2d 1045, 1059 (3rd Cir. 1980), which is directly in point, viz:

> The only interest that the Association can assert in this context is the taxpayer interest of its members, who may be concerned to ensure that the government does not lease or sell property at too low a price. Such an interest does not confer standing to sue. See Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968); Frothingham v. Mellon, 262 U.S. 447, 43 S.Ct.597, 67 L.Ed. 1078 (1923).

Admittedly, this rule of standing is essentially a judicial rule, and it might be argued that an administrative agency should be more lenient in allowing access to its appellate process. Yet, the reasons for the rule are equally compelling in the administrative process. "Taxpayer" appeals in this Department alone could challenge a wide variety of transactions on the contention that the Government accepted insufficient remuneration, including, inter alia, rights-of-way, ground leases, land sales, mineral leases let by competitive bidding, trespass settlements, royalty computations, user fees for special use permits, etc. When extended to include all the other agencies of Government, the potential list of reviewable "taxpayer" appeals would become infinite; e.g., that the General Services Administration is selling surplus jeeps too cheaply, or that the Customs Service is not getting enough from sales of seized contraband. [Emphasis in original.]

We believe that, in accordance with this rationale, appellants lack standing to appeal the economic return from the sale. It should be noted, however, that the bid is not less than the appraised value as is required by the relevant regulation. 43 CFR 5443.1.

[1] The timber lands affected by the proposed sale are managed by BLM under the authority of the Act of August 28, 1937 (O & C Act), 43 U.S.C. §§ 1181a-1181f (1982), and sections 301 and 302 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1731, 1732 (1982). 1/ Central among BLM's responsibilities under the O & C Act and related FLPMA provisions is the responsibility of managing O & C timber lands in accordance with the principle of "sustained yield." In reviewing BLM's exercise of this responsibility, the Board consistently has deferred to BLM's judgment in the absence of a clear showing by appellant either that BLM has failed to consider important factors or that BLM's proposed action is not supported by the administrative record. E.g., In re Otter Slide Timber Sale, supra at 382; Diana Coogle, 61 IBLA 393, 394 (1982). In determining whether an appellant has succeeded in carrying this burden of proof, the Board considers all relevant information regardless of whether it was generated during BLM's initial decision process or during the proceeding before the Board. In re Lick Gulch Timber Sale, 72 IBLA 261, 273 n.6, 90 I.D. 189, 196 n.6 (1983).

Regarding BLM's assessment of the regenerative capacity of the proposed sale area, both appellants have challenged BLM's classification of the area as "high intensity" forest management land. The nature of this classification is described in the Jackson-Klamath FES as follows:

> The high intensity category may also be referred to as the timber production base. These commercial forest lands are suitable for continuous timber production with reasonable assurance of successful results from the application of intensive timber management practices. Approximately 16 percent of the high intensity lands possess soil, topographic and climatic conditions suitable for clearcut harvest techniques. Regeneration can be accomplished within 5 years of harvest with standard artificial reforestation methods.
>
> The remaining high intensity lands exhibit characteristics which would make regeneration within 5 years unlikely if they were clearcut. Two-stage shelterwood harvest technique is proposed for the majority of these areas. Establishment of a new stand could be accomplished within 5 years of the regeneration cut under this prescription, using artificial reforestation methods.

(FES at 1-8). 2/ Focusing on the criterion of the high intensity category that "[r]egeneration can be accomplished within 5 years of harvest with standard artificial reforestation methods," appellants assert that pertinent BLM

1/ A more detailed statement of the legislative background of the so-called "O & C Lands" can be found in In re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983).

2/ The high intensity category is an element of the Timber Production Capability Classification (TPCC) System used by BLM in classifying the timber production capability of the forest lands managed by BLM in western Oregon (FES at 1-5 thru 1-10).

records indicate that the lands to be affected by the proposed timber sale are not susceptible to high intensity management.

For their part, ACOTS notes that BLM's past efforts to regenerate forest cover on lands within a 10-mile radius of the proposed sale area have met with a "distinct lack of success" (ACOTS Statement of Reasons (SOR) at 15). It bases this evaluation on its review of BLM's reforestation records, from which it offers the following summary:

> Records on 9,782 acres within a ten mile area of the sale tract, gathered from both the Jacksonville and Josephine Resource Areas, [3/] have been the object of our study. The tabulations of these records form Appendix XIII. The following figures are derived from those records and form the primary basis of this appeal. Of the 9,782 acres, 1,134 do not have a five year history. The reforestation results on the remaining 8,648 acres are as follows:
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> | | Acres | % |
> |---|---|---|
> | stocked and established in 5 years: | 53 | 0.61% |
> | stocked but unestablished in 5 years: | 3730 | 43.13% |
> | understocked in five years: | 3400 | 39.31% |
> | no date of denudation: | 228 | 2.63% |
> | fire: | 168 | 1.94% |
> | no five year survey: | 52 | 0.60% |
> | no update: | 308 | 3.56% |
> | missing/not classified: | 709 | 8.19% |
> | | 8648 | 99.97% |

(SOR at 16).

Likewise, TELAV has studied BLM reforestation records, focusing on records for the southern portion of the Jacksonville Resource Area. TELAV has provided the following summary of this review:

> Records on 4,606 acres comprising the southern portion of the Jacksonville Resource Area, by which we mean specifically that portion which lies south of Township 36 South, have been the object of our study. The tabulations of these records form Appendix V. The following figures are derived from those records and are the basis for this appeal. Of the 4,606 acres, 919 acres do not have a five-year history. The reforestation results on the remaining 3,687 acres are as follows:
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> | | | |
> |---|---|---|
> | stocked/established in 5 years: | 53 acres | (1.4%) |
> | stocked/unestablished in 5 years: | 2,349 acres | (63.7%) |
> | under/stocked in 5 years: | 1,285 acres | (34.9%) |

3/ BLM has explained that there is no Josephine Resource Area, but rather the Grant's Pass Resource Area of the Josephine Master Unit.

> The area of the proposed Thompson Creek Timber Sale is representative of the southern portion of the Jacksonville Resource Area. The proposed sale area lies within ten miles of 35% of the above reforestation acres. [See Appendix VI: Map]

(TELAV's SOR at 3).

In its answer BLM has submitted data from 1982 field surveys conducted in the vicinity of the proposed sale area. Following is BLM's summary and explanation of this data:

> Prior to 1976, the BLM reforestation survey system had only two categories: Stocked or non-stocked/understocked. No other categories existed. In 1976, the Bureau changed to its present system of understocked, stocked established, and stocked unestablished. All stocked units were entered in the records as stocked unestablished until field surveys were done to determine if the units met the criteria for established. Field surveys done in 1982 reveal the following current classification of reforestation units in the south half of the Jacksonville Resource Area (Attachment No. III).
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> | | |
> |---|---|
> | Stocked, established | 2,213 acres |
> | Stocked, unestablished | 1,074 acres |
> | Understocked | 327 acres |
>
> Records for the south part of the Josephine Master Unit indicate the following:
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> | | |
> |---|---|
> | Stocked, established | 1,546 acres |
> | Stocked, unestablished | 2,012 acres |
> | Understocked | 625 acres |
>
> Many of the Units listed as stocked, unestablished in TELAV's and ACOTS' Statement of Reasons were, in fact, pre-commercial thinned in 1982 to remove surplus reproduction. These lands have indeed met the criteria for classification as "high intensity land".

(BLM's Answer at 2).

ACOTS filed a reply in which it acknowledged that BLM's data is based on more recent field surveying than their own, but argued that BLM had not refuted their basic point that the regeneration period on lands in the vicinity of the proposed sale area has usually exceeded 5 years. Thus, ACOTS maintains its position that BLM cannot properly characterize the proposed sale area as high intensity land.

In reviewing the parties' arguments concerning BLM's classification of the proposed sale area as "high intensity" land, we are mindful of certain pronouncements in the Lick Gulch decision:

> That evidence of past regeneration is of some relevance is clear. To the extent that past cuts have failed to regenerate where the harvesting occurred in conditions similar to the specific physical circumstances of the instant sale sites, when those sites were treated in a manner similar to that presently contemplated by the silvicultural prescription for the sale sites in Lick Gulch, the success or failure of reforestation attempts is of particular import. But to the extent that each former site varies more and more from the Lick Gulch sites, or where past treatment cannot be considered comparable with that proposed herein, the relevance of regeneration success or failure becomes increasingly attenuated. * * *
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> * * * We recognize that it can become all too easy to blame the mistakes of the past on prior management practices and to suggest that none of the negative results that characterized such activities will recur simply because more enlightened management policies will be pursued in the future. On the other hand, we cannot blind ourselves to the fact that knowledge concerning silviculture regimens has increased over the years, based, in part, on lessons gleaned from the very management activities of the past which are presently decried.

72 IBLA at 282, 290, 90 I.D. at 201, 205-06. BLM has pointed out that the term "established" as used in the reforestation manual describes a tree or stand which "is past the time when considerable juvenile mortality occurs and the tree or stand is no longer in need of measures to insure survival." (Attachment 2 to Answer). On the other hand, BLM notes that the term is used in its nontechnical sense in the Jackson-Klamath FES to "indicate that the new trees have been planted and are, in fact, living and growing." 4/ Id. Based on this standard and the updated surveys, BLM contends that 91 percent of the acreage in the South Jacksonville Resource Area qualifies as stocked. Although the data for the Josephine Master Unit has not been updated, BLM asserts that 86 percent of the acreage qualifies as stocked.

[2] This Board has previously rejected the contention that the mere stocking or planting after harvesting constitutes the establishment of a new stand of trees within 5 years. In re Chapman-Keeler Timber Sale, 80 IBLA 237 (1984). A stand is "established" if it consists of suitable growing trees which have survived at least one growing season and which are past the time when considerable juvenile mortality occurs. In re Lick Gulch Timber Sale, supra at 285, 90 I.D. at 203. This is distinguishable from "stocking," referring to the number of suitable trees per acre. Recognizing this distinction, the issue is whether appellants have established that the land in the timber

4/ With respect to land in a regeneration cut unit, BLM asserts that seedlings growing under an overstory of mature trees would never qualify as "established" in the technical sense because of the reasonable probability of loss from the felling and removal of the overstory trees.

sale units is incapable of regeneration within 5 years. What is contemplated under BLM's TPCC, as discussed in the FES, is not absolute certainty that new growth will be established on "high intensity" land within 5 years of a cutting, but that the lands "are suitable for continuous timber production with reasonable assurance of successful results from the application of intensive timber management practices," and that "[r]egeneration can be accomplished within 5 years of harvest with standard artificial reforestation methods" (FES at 1-8 (emphasis added)). We are not persuaded that BLM unreasonably concluded that regeneration can be accomplished on the proposed sale area in accordance with the relevant criteria. Thus, we will not disturb BLM's classification of the proposed sale area as high intensity land.

[3] We next address ACOTS' assertion that under the silvicultural prescriptions for units involving regeneration cuts, more of the original stand basal area would be removed than is consistent with the guidelines in the FES. In its order of September 19, 1983, the Board directed BLM to explain its seeming departure from the FES guidelines for regeneration cuts. 5/

In response to the Board's order, BLM described the purposes of regeneration cutting and the general process of determining the appropriate amount of timber to leave:

> The objective of the shelterwood reforestation system is to create a modified environment that will facilitate the establishment of new seedlings. There is indeed a fine line here between site and operational requirements. Depending on stand conditions (size of overstory trees, slope percent, etc.) a given leave BA [basal area] may facilitate the establishment of new seedlings, yet the residual overstory may be too heavy to allow overstory (final) removal without destroying newly established regeneration. The "optimum BA" to leave, then, is that BA which both modifies the site to facilitate seedling establishment and is such that it can be subsequently removed without causing unacceptable damage to regeneration i.e. reducing stocking levels below 60% of target standards.
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> * * * * * * *
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> * * * The specific criteria used by the forester to determine the optimum BA to leave is determined on a unit by unit, tree by tree basis. The forester has two main reforestation goals in mind with respect to deciding on trees to remove

5/ The FES provides at 1-28: "The regeneration cut of a shelterwood harvest would remove from 30 to 60 percent of the original stand basal area. Maximum removal on south or west slopes would be 50 percent." In BLM's response to the ACOTS' statement of reasons on this point the agency asserted, without explanation: "[T]he optimal basal area per acre to leave for the regeneration cut of a shelterwood system is in the range of 30 to 60 square feet per acre. What percentage that is of the original stand depends on what the original basal area of the stand was."

> or leave in a given unit. The first is to leave enough overstory trees in a unit to protect young seedlings by providing shade. Secondly, the forester must look at the slope gradient, tree diameter, tree quality, crown size, and spacial [sic] arrangement of the trees. These factors not only determine the quality and quantity of the overstory trees to remain, but the potential damage that may be done to new seedlings during the overstory removal. The actual BA remaining is a result of the application of the above site specific decisions by the forester and not based on a predetermined percentage of the original BA to be removed or left. [Emphasis in original.]

As for the particular parameters concerning regenerations cuts stated in the FES, BLM asserts:

> The two-story shelterwood was adopted as a reproduction method in the Jackson-Klamath Timber Management Environmental Statement (1.3.2). Paragraph one of Section 1.3.2.1 states that 30-60 percent of the original stand BA would be removed during the regeneration cut with a maximum of 50% BA removal on south and west slopes. These percentages were never intended to be criteria by which the amount of regeneration cut on individual units would be determined but were placed in the ES only as an estimated amount of the regeneration cut.

Finally, in support of its determination of the appropriate size, number, and spacing of leave trees on regeneration cut units, BLM reported that significant information generated since the publication of the FES justifies a leave volume smaller than that suggested in the FES. 6/

ACOTS's evaluation of BLM's response manifests an overriding concern with the fact of BLM's deviation from the numbers in the FES, coupled with criticism of BLM's conclusion that technical studies more recent than the FES support the deviation.

As for appellants' opposition to any deviation from the provisions of the FES, we must observe that, under the National Environmental Policy Act of 1969 (NEPA), 7/ an agency has a duty to continue to gather and evaluate information pertinent to the environmental impacts of a major Federal action after the release of an environmental impact statement for the action. E.g., California v. Watt, 683 F.2d 1253, 1267 (9th Cir. 1982); 8/ see 40 CFR 1502.9(c). Thus, BLM would be remiss in the performance of its duties if it were not to take into account information that has become available after issuance of the FES, in composing the terms of each proposed timber sale. Whether a supplemental environmental impact statement might be required prior to BLM's utilization of such information in support of deviations from the

6/ With its response to the Board's Sept. 19 order, BLM appended various technical materials concerning regeneration cutting.
7/ 42 U.S.C. §§ 4321-4361 (1982).
8/ Rev'd on other grounds, 104 S. Ct. 656 (1984).

provisions of the FES depends on the significance of the provisions, themselves, and of the magnitude of the contemplated deviations from those provisions. See 40 CFR 1502.9(c); e.g., Warm Springs Task Force v. Cribble, 621 F.2d 1017, 1023-24 (9th Cir. 1980).

The parameters provided in the FES for the relative quantity of timber to be removed in a regeneration cut undoubtedly constitute an estimated range based on consideration of the purposes of the regeneration harvesting technique. Their significance with respect to other elements of the FES is essentially limited to their affect on estimates of the timing of timber harvesting. 9/ The nature of this impact is not such as to suggest the need for a supplemental environmental impact statement prior to a deviation from the parameters in the conduct of BLM's timber management program for the Jackson and Klamath Sustained Yield Units. Although this term of the silvicultural prescription may involve a deviation from the terms of the Jackson-Klamath FES, this appears to be a rationally supportable determination in light of the evidence at hand and we are not persuaded that a supplemental environmental impact statement is required. See In re Bald Point Timber Sale, 80 IBLA 304 (1984).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Franklin D. Arness
Administrative Judge

9/ The actual take in a particular first-stage regeneration cut bears directly on the timing of timber harvesting but not on the ultimate volume of timber to be harvested from the affected lands.